

*a***LATIF CHE NGAH & ANOR****v.****MAIMUNAH ZAKARIA***b*

HIGH COURT MALAYA, KUALA TERENGGANU

NIK HASHIM J

[CIVIL APPEAL NO: 12-30-1999]

24 AUGUST 2002

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CIVIL LAW ACT: *Damages - Fatal accident - Loss of dependency - Appeal against award - Whether multiplicand of RM1,500 per month in the absence of documentary evidence justified - Whether court has discretion to alter multiplier of 16 years' purchase fixed under s. 7(3)(iv)(d) of Act - Whether total sum awarded should be subjected to a further cut of 1/3 for contingencies - Whether interests for post-trial dependency should be allowed*

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This was an appeal against the award of damages granted by the sessions judge to the respondent for her claim on loss of dependency pursuant to s. 7 Civil Law Act 1956 ('the Act'). The respondent was a housewife with six children who lost her 33 year-old husband ('the deceased') in a road accident upon whom they were dependant for support. The sessions judge awarded the

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damages based on a multiplicand of RM1500 per month and a multiplier of 11. The appellants argued that: (i) there was no documentary evidence to support the deceased's income; and (ii) the total sum awarded should be subjected to a further 1/3 deduction for contingencies based on the case of *Chan Chin Ming v. Lim Yoke Eng*.

*f***Held:***g*

[1] In assessing the loss of earnings in respect of any period after the death of a person, the court has no discretion to alter the statutory-fixed multiplier of 16 years' purchase in respect of a person who was of 30 years of age or below at the time of his death, by virtue of the mandatory term "shall" in s. 7(3)(iv)(d) of the Act and the case of *Marappan & Anor v. Siti Rahmah Ibrahim*. (p 447 b-d)

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[2] The case of *Chan Chin Ming v. Lim Yoke Eng* was distinguished. The decision therein related to a claim by a parent. A claim by a spouse and children is not affected by the decision. (p 452 b)

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[3] Though the deceased's income of RM4,000 per month was not substantiated, the amount of RM1,500 per month as loss of support to the deceased's widow and six children was fair and reasonable. There was no basis for the appellant's fear that the respondent could have exaggerated

the amount. The sessions judge who heard and saw the respondent had obviously accepted the evidence of the respondent and had taken into consideration the fact that she had six children to support in awarding the amount. The award was justified in the circumstances. (p 446 f-g)

[4] Following the Court of Appeal case of *Ng Soo Ang v. Chai Chuan Seng*, the sessions judge made no error of law when he relied on the Supreme Court case of *Marappan & Anor v. Siti Rahmah bte Ibrahim* for the interpretation of s. 7(3)(iv)(d) of the Act as the authority for not allowing a further cut of 1/3 from a total sum of RM198,000 which he awarded for loss of dependency. (p 452 c-d)

[5] With regard to the post-trial dependency, interests should not be allowed. Accordingly, the order of the sessions judge allowing for such interest should be varied. (p 452 e)

[Appeal dismissed.]

Case(s) referred to:

Chan Chin Ming v. Lim Yok Eng [1994] 3 CLJ 687 (**dist**)

Marappan & Anor v. Siti Rahmah Ibrahim [1990] 1 CLJ 32; [1990] 1 CLJ (Rep) 174 (**refd**)

Ng Soo Ang v. Chai Chuan Seng (Rayuan Sibil No: P-04-18-1998) (unreported) (**refd**)

Takong Tabari v. Government of Sarawak & Ors And Another Appeal [1998] 4 CLJ 589 (**refd**)

Legislation referred to:

Civil Law Act 1956, ss. 7(3)(iv)(d), 28A(2)(d)

For the appellants - M Kumar; M/s T Raja & Co

For the respondent - Americk Sidhu; M/s GTS & Americk Sidhu

Reported by Usha Thiagarajah

JUDGMENT

Nik Hashim J:

The Appeal

This is the appellants' appeal against the quantum of damages only from the judgment of the Sessions Court Judge, Kuala Terengganu in a road accident case which took place on 17 April 1997, in which the respondent, a housewife with six children, had lost her 33 year-old husband, upon whom they were dependant for support. The respondent's claim was for loss of dependency pursuant to s. 7 of the Civil Law Act 1956 (the Act).

a By an order of 22 August 1999, the learned judge of the Sessions Court after the hearing of the case gave judgment against the appellants and made the following awards in favour of the respondent, namely:

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|----------|--|--------|--|
| b | (i) Bereavement | | RM10,000 |
| | (ii) Burial costs | | RM2,000 |
| | (iii) Cost of documents | ... | RM50 |
| | (iv) Loss of support | | RM1,500 x 11 years (28 months for pre-trial and 104 months for post trial = RM198,000) |
| c | (v) Interest for special damages at 4% per annum from date of accident up to the date of judgment. | | |
| d | (vi) Interest for general damages at 8% per annum from date of summons up to the date of judgment. | | |
| | (vii) Costs of this action. | | |

The appeal before this court pertains to the loss of support and the interests for post trial dependency.

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Contentions Of The Parties

Before me, learned counsel for the appellants, Mr. M. Kumar, complained that there was no evidence to show the deceased's income and therefore, the learned trial judge erred when he accepted the evidence of the respondent outright without other supporting evidence. However, for the multiplicand, he suggested RM1,000 per month for 11 years as being reasonable for loss of support and a further 1/3 deduction against the total award for contingencies, other vicissitudes of life and accelerated payment and quoted the Court of Appeal case of *Takong Tabari v. Government of Sarawak & Ors and Another Appeal* [1998] 4 CLJ 589 and the Supreme Court case of *Chan Chin Ming v. Lim Yok Eng* [1994] 3 CLJ 687 in support of his argument.

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Learned counsel for the respondent, Mr. Americk Sidhu, on the other hand, contended that the award of RM1,500 per month for loss of support was reasonable as it was awarded based on the evidence led in court, and as such it should not be disturbed. With regard to the multiplier, learned counsel submitted that the multiplier of 11 years was correct and in support he cited *Marappan & Anor v. Siti Rahmah bte Ibrahim* [1990] 1 CLJ 32; [1990] 1 CLJ (Rep) 174, a Supreme Court case.

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Multiplicand

With regard to the deceased's earning in Singapore, the learned judge in his grounds of decision at p. 243 para C of the appeal record said:

Mengenai pendapatan simati saya menerima penghujahan peguam plaintif bahawa pendapatannya adalah sebanyak RM4,000.00 sebulan walaupun tidak disokong oleh apa-apa keterangan dokumentari. SD1 (1st Appellant) di dalam keterangannya juga telah mengesahkan bahawa simati telah bekerja di Singapura kerana beliau memang kenal dengan simati.

And in accepting the respondent's evidence regarding the amount of RM1,500 per month that the deceased husband gave her, the learned judge at p. 244 para A said:

Saya juga menerima keterangan SP2 (the respondent) bahawa pemberian sebanyak RM1,500.00 oleh suaminya sebulan kerana jumlah ini adalah munasabah memandangkan simati mempunyai 6 orang anak sebelum kematiannya ...

In my judgment, the learned judge was right when he accepted the evidence of the respondent and awarded a sum of RM1,500 per month as loss of support to the deceased's widow and six children based on the evidence adduced in court. The respondent's (SP2's) evidence was clear and this is what she said at p. 34 para E:

Sebelum kemalangan suami saya bekerja sebagai tukang plaster di Singapura. Dia telah bekerja di Singapura selama lima tahun sebelum kemalangan ini. Gajinya ialah sebanyak RM4,000.00 sebulan. Suami saya telah memberi sebanyak RM2,000.00 sebulan kepada saya. Suami saya balik dua bulan sekali. Dia telah memberi kepada saya sebanyak RM3,000.00 untuk dua bulan. Suami saya telah memberi kepada saya RM1,500.00 sebulan. Baki pendapatan suami saya telah disimpan olehnya untuk kegunaannya. Saya tidak tahu siapakah majikan suami saya di Singapura. Makan minum dan tempat tinggal di Singapura adalah tanggungan suami saya sendiri. Suami saya tidak memberitahu saya dia tukang plaster di bangunan mana.

Her explanation that she did not know about her deceased husband's employer in Singapore as she was not told by her husband, was reasonable, for the deceased did not expect to die on that fateful day. If he had, then perhaps he may have told his wife the name and address of his employer in Singapore. That explains for the absence of the documentary proof of the deceased's income in this case.

Further, the 1st appellant (SD1) admitted he knew that the deceased was working in Singapore when he, under cross-examination at p. 45 para D, said:

- a* Saya kenal dengan arwah simati. Dia tinggal sekampung dengan saya. Saya juga kenal dengan isteri simati. Simati bekerja di Singapura.

With regard to the deceased's earnings, the learned counsel for the appellants, in cross-examination of the respondent (SP2) on 12 January 1999, put to the respondent that her husband's income was SD35-40 per day. The respondent's answer at p. 35 para E said:

- b* Saya tidak bersetuju gaji suami saya adalah SD35.00-40.00 sehari.

- c* Thus, from the evidence, it is manifestly clear that the deceased was working and earning a living as a plasterer in Singapore for five years before the accident. SD35-40 at 1997 rates would have translated into RM80-92 per day at an exchange rate of RM2.30 to one Singapore Dollar. Assuming the deceased worked only 25 days per month, excluding working overtime, the appellants' evidence disclosed a monthly income of RM2,000 to RM2,300, out of which the learned judge awarded a sum of RM1,500 as loss of support to the respondent and six children. In this regard, I do not think the learned judge erred in his award. With respect, I agree with the learned counsel for the respondent that it is not sufficient to say that the respondent would not need so much money a month just because she lives in a little kampung in Besut, Terengganu. It was common knowledge then that people from Kelantan and Terengganu went to work in Singapore for good money. I take judicial notice that the wages there were substantially higher than those in Malaysia. It is therefore obvious that the reason for the respondent's deceased husband chose to work away from his family in a foreign country was to improve his standard of living and the standard of living of his family.

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- e*
- f* In the circumstances of this case, though the deceased's income of RM4,000 per month was not substantiated, I still find the amount of RM1,500 per month as loss of support to the deceased's widow and six children as fair and reasonable. There was no basis for the appellant's fear that the respondent could have exaggerated the amount. The learned judge, who heard and saw the respondent, obviously had accepted the evidence of the respondent and had taken into consideration the fact that she had six children to support, in awarding the amount. In my view, the award was justifiable in the circumstances.

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Multiplier

- h* Learned counsel for the appellants conceded that the multiplier in the case of the deceased who was 33 years old at the time of the fatal accident is 11 years based on the statutory formula: $55-33$ divide by $2 = 11$ years, but he wanted a further cut of $1/3$ against the total award for contingencies based on the authorities he earlier cited. Learned counsel for the respondent objected to the further cut.
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In order to resolve the rival contentions, perhaps the following cases need to be considered.

In *Marappan & Anor v. Siti Rahmah bte Ibrahim* [1990] 1 CLJ 32; ([1990] 1 CLJ (Rep) 174), the Supreme Court comprising Hashim Yeop A Sani CJ (Malaya), Harun Hashim and Gunn Chit Tuan SCJJ, had at p. 34 (p. 177) decided:

The legislature has made its intention very clear by using mandatory language in s. 28A(2)(d) of the Act that in assessing damages for loss for future earnings the court shall take into account that in the case of a person who was of the age of thirty years or below at the time when he was injured, the number of years' purchase shall be 16.

It is pertinent to note that s. 28A(2)(d) is in *pari materia* with s. 7(3)(iv)(d) with regard to the number of years' purchase. So, whatever interpretation accorded to s. 28A(2)(d) must on the basis of consistency be applied to s. 7(3)(iv)(d). Thus, by using a mandatory term "shall" in s. 7(3)(iv)(d) of the Act and if *Marappan* is followed, then, in assessing the loss of earnings in respect of any period after the death of a person, the court has no discretion to alter that statutory-fixed multiplier of 16 years' purchase in respect of a person who was of the age of 30 years or below at the time of his death.

It is true that the issue of further deduction for contingencies, other vicissitudes of life and accelerated payment was not raised in *Marappan*, and therefore the Supreme Court there did not have the opportunity to decide on the issue.

Then came *Chan Chin Ming*. In *Chan Chin Ming*, the plaintiff, a 48-year-old mother, claimed for loss of support as a result of a fatal accident in which her deceased unmarried 25 year-old son was involved. His Lordship Peh Swee Chin SCJ (delivering the majority judgment of the Supreme Court) ruled that the court still retains a discretion to reduce the number of years of purchase to a period less than 16 years to provide for contingencies, such as the probability of the deceased marrying had he not died. Thus, the Supreme Court reduced the 16 years' purchase decided by the High Court to seven years.

However, Edgar Joseph Jr SCJ in his powerful dissenting judgment at p. 699 had this to say:

I regret I have to part company with the majority of the members of this court and say that I cannot accede to the submission of counsel for the defendants regarding this part of the case as to do so, would be to fly in the face of the mandatory provisions of proviso (d) to s. 7(3)(iv) of the Act, which fixes the multiplier at 16 years in cases such as the present.

a To my mind, it is manifestly clear, that in enacting the detailed provisions of proviso (d) to s. 7(3)(iv), Parliament had intended to take away the discretion of the court to select the appropriate multiplier, in assessing loss of earnings of a deceased person in respect of any period after his death, for purposes of a claim for loss of support under s. 7(1).

b At p. 700, his Lordship held:

I, therefore, agree with the trial judge that contingencies such as the probability of the deceased marrying had he not died in the accident and, as a result, his contributions for the support of his mother ceasing or being considerably reduced, 'have been built into the statutory formula of 16 years'; and that, therefore, he was bound to adopt that statutory formula since the deceased was 25 years of age at the time of his death.

And further down, his Lordship concluded:

d ... If the court has no discretion to alter the statutory multiplier of 16 years' purchase ... then equally, it cannot do so indirectly, by reducing the multiplicand ...

The majority decision in *Chan Chin Ming* was followed by the Court of Appeal in *Takong Tabari*. In these two cases, however, *Marappan* was not referred to.

e In *Takong Tabari*, the Court of Appeal following *Chan Chin Ming* held that 'the common law practice of making deductions for contingencies, other vicissitudes of life and accelerated payment continues to be in force as Parliament had not expressed its intention to depart from the general system of law. Under such circumstances, the trial judge made no error of law when he made the 1/3 deduction.'

Besides *Takong Tabari*, there is another Court of Appeal case on loss of support. Learned counsel for the respondent drew my attention to the recent case of *Ng Soo Ang v. Chai Chuan Seng*, Mahkamah Rayuan, Rayuan Sibil No. P-04-18 Tahun 1998 where the court, comprising Datuk Mokhtar bin Haji Sidin, Dato' Abdul Hamid bin Haji Mohamad and Datuk Wira Haji Mohd Noor bin Haji Ahmad JJCA, heard the appeal by housewife Ng Soo Ang on 17 January 2002 and the case was reported on the next day in the New Straits Times, against a High Court decision on 12 February 1998, which reduced Ng's award for loss of support to be paid from 16 years to 8 years as Ng had remarried by then. Ng, now 35, had sued businessman Chai Chuan Seng in a Sessions Court for an accident which caused her husband's death in Jalan Baru, Prai on 2 May 1990. The husband was 24 at the time of his death. The trial judge found that Chai was 100% liable for the accident and awarded Ng damages for loss of support to be paid for 16 years at RM750 per month.

Chai later appealed against the decision to the High Court, which reduced the number of years' purchase to 8 as Ng had remarried by then. The Court of Appeal was reported as saying that when a widow remarried, it should not affect the amount awarded by the courts for loss of support. The court noted that even the Government encouraged widows to remarry by amending the Pensions Act, which allowed widows to continue getting their deceased husbands' pension payments. Therefore, the court held that the question of remarriage should not be deemed as good consideration for the courts to reduce the quantum for loss of support for women whose husbands died before reaching 30. Thus, the Court of Appeal ruled that the High Court judge was wrong in reducing the number of years of purchase for loss of support of her deceased 24 year-old husband from 16 to 8 years and reinstated the number of years' purchase to 16. The order of the court is now reproduced in full:

DALAM MAHKAMAH RAYUAN MALAYSIA
BERSIDANG DI PULAU PINANG
(BIDANG KUASA RAYUAN)
RAYUAN SIBIL NO. P-04-18 TAHUN 1998

Antara

NG SOO ANG
(Isteri kepada LOW BOON HAI simati sebagai Dependan) ... Perayu

Dan

CHAI CHUAN SENG

... Responden

Dan

NG SOO ANG
(Sebagai Pentadbir Harta Pusaka
LOW BOON HAI)

... Pihak Ketiga

(Dalam Mahkamah Tinggi Pulau Pinang
melalui Rayuan Sibil No. 12-87-96)

Antara

NG SOO ANG
(Isteri kepada LOW BOON HAI simati sebagai Dependan) ... Perayu

Dan

CHAI CHUAN SENG

... Responden

Dan

- a* NG SOO ANG
(Sebagai Pentadbir Harta Pusaka
LOW BOON HAI) ... Pihak Ketiga
(Dalam Mahkamah Sesyen Butterworth
melalui Kes Sibil No. 53-287-95)
- b* Antara
NG SOO ANG
(Isteri kepada LOW BOON HAI
simati sebagai Dependan) ... Plaintiff
- c* Dan
CHAI CHUAN SENG ... Defendan
Dan
- d* NG SOO ANG
(Sebagai Pentadbir Harta Pusaka
LOW BOON HAI) ... Pihak Ketiga
- KORAM:
- e* YANG ARIF DATUK HAJI MOKHTAR BIN HAJI SIDIN, H.M.R.
YANG ARIF DATO' ABDUL HAMID BIN HAJI MOHAMAD, H.M.R.
YANG ARIF DATUK WIRA HAJI MOHD NOOR BIN HAJI AHMAD,
H.M.R.
- f* DALAM MAHKAMAH TERBUKA
PADA 17HB JANUARI 2002
PERINTAH
- g* RAYUAN INI ditetapkan untuk perbicaraan pada hari ini dalam kehadiran
Encik Baldev Bhar (bersama Encik D.P. Rajah), peguam bagi pihak perayu dan
Encik Veerasamy Rajendran peguam bagi pihak responden DAN SETELAH
MEMBACA Rekod Rayuan yang telah difailkan DAN SETELAH
MENDENGAR hujah peguam-peguam tersebut ADALAH DIPERINTAHKAN
bahawa:
- h* 1) Rayuan dibenarkan.
2) Multiplier dari 8 tahun dipinda ke 16 tahun dan Multiplicand yang telah
diawadkan untuk sejumlah RM750.00 sebulan dikekalkan.
3) Kos Rayuan di Mahkamah Rayuan diawadkan sejumlah RM500.00 dibayar
oleh Responden kepada Perayu.
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4) Kos Rayuan dan Kos Rayuan Balas di Mahkamah Tinggi Pulau Pinang kepada Perayu.

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5) Wang Deposit yang dibayar oleh Perayu dikembalikan.

DIBERI di bawah tandatangan saya dan Meterai Mahkamah pada 17hb Januari 2002.

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t.t.

HASNAH DATO' MOHAMMED HASHIM

...

PENDAFTAR

MAHKAMAH RAYUAN MALAYSIA
KUALA LUMPUR.

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Now, I have to consider whether there is any, and if so, what material difference between the claimant in *Chan Chin Ming* and the claimant in the present case. The obvious difference between the two claimants which I consider to be most material, is this: under *Chan Chin Ming*, the claimant was the deceased's parent mother whereas the case under consideration the claimant was the deceased's widow. Therefore, since *Chan Chin Ming* is readily distinguishable from the present case, the *ratio decidendi* pertaining to the number of years' purchase in respect of a claim for loss of support of a deceased unmarried child by a parent as stated in *Chan Chin Ming*, in my view, does not apply to the present case which is a claim for loss of support by a spouse and her six children. I, therefore, with respect, agree with the submission of learned counsel for the respondent that *Chan Chin Ming* has no relevance to this case.

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In fact, from a close scrutiny of *Chan Chin Ming*, it is interesting to note that his Lordship Peh Swee Chin SCJ has drawn a very clear distinction between a dependency claim by a spouse and children and a claim by a parent, when he at pp. 695-696 said:

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Having regard to the state of the general system of the law before the coming into force of sub-para (d) on 1 October 1984, sub-para (d) seems to be tailor-made for a claim by a spouse and children as dependants in respect of a deceased spouse, because under the general system of law, both before and after the enactment of sub-para (d), the duration of a claim for loss of support is usually as long as the deceased's loss of earnings, which would have been earned had the deceased lived.

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- a* On the other hand, the state of the general system of law relating to a parent's claim as a dependant for loss of support in respect of an unmarried child before the enactment of sub-para (d) was that such loss of support would either cease or be reduced considerably on the almost invariable contingency of subsequent marriage of such unmarried child. If the learned judge was right, it would mean that this aspect of the law was swept away or changed.
- b* (emphasis added)

Thus, it is clear from the above passages that the whole decision in *Chan Chin Ming* relates to a claim by a parent. A claim by a spouse and children is not affected by the decision.

- c* Accordingly, for the purpose of the present case and following the later decision of the Court of Appeal in *Ng Soo Ang*, I hold that the learned judge of the Sessions Court made no error of law when he relied on the Supreme Court case of *Marappan* for the interpretation of s. 7(3)(iv)(d) of the Act as the authority for not allowing a further cut of 1/3 from a total sum of
- d* RM198,000 which he awarded for loss of dependency based on the multiplier of 11 years' purchase and the multiplicand of RM1,500 per month.

With regard to the post-trial dependency, I agree with the appellants that no interests be allowed and thus, the order of the learned judge allowing for such interest is varied accordingly.

- e* To that extent, the appeal is dismissed with 3/4 costs to the respondent.

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